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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE RAMOS,

Defendant and Appellant.

A156046

(Alameda County
Super. Ct. No. 618725)

A jury convicted Jorge Ramos of five felonies, including sexual intercourse or sodomy with a child 10 years of age or younger (Pen. Code, § 288.7, subd. (a)),¹ and the trial court sentenced him to 65 years to life in state prison. On appeal, Ramos contends the court erred in instructing the jury with CALCRIM No. 361 (failure to explain or deny adverse testimony). He also claims the prosecutor committed misconduct during closing argument.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The prosecution charged Ramos with two counts of sexual intercourse or sodomy with a child 10 years or younger (§ 288.7, subd. (a)); oral copulation or sexual penetration with a child 10 years or younger (§ 288.7, subd. (b)); continuous sexual abuse of a child under the age of 14 (§ 288.5, subd. (a)); and driving in willful or wanton

¹ Undesignated statutory references are to the Penal Code.

disregard for the safety of persons or property while fleeing from a police officer (Veh. Code, § 2800.2, subd. (a)).

Prosecution Evidence²

Doe was born in 2003. Her mother (mother) met Ramos in 2008. Mother and Ramos began dating; they married in 2011. During their relationship, Ramos was deported twice and he had sexual relationships with other adult women. Doe, mother, and Ramos lived together at various locations in the East Bay.

In the summer of 2010, Doe was six years old. She shared a bed with mother and Ramos. One morning, when mother was already at work, Ramos and Doe were in bed. Ramos grabbed Doe's legs, worked his way up her thighs, and rubbed Doe's vagina underneath her pajamas. Later, the behavior escalated and Ramos began undressing and raping Doe, always in the morning, after mother left the house. That summer, Ramos raped Doe five times.

At their next residence, Doe had her own bedroom and Ramos did not sexually abuse her. When Doe was about nine years old, however, she, mother, and Ramos moved again. Doe did not have her own room; she slept in mother and Ramos's bed. When mother was not in the room, Ramos sexually abused Doe: he touched her breasts under her clothes, digitally penetrated her vagina, and raped her. When Doe began menstruating shortly before her tenth birthday, Ramos stopped raping her, to avoid getting her pregnant. Instead, he digitally penetrated her vagina and touched her breasts. Ramos sexually molested Doe when she was in sixth grade.

In 2015, mother ended the relationship with Ramos after she saw him in a car with another woman. Doe and mother moved, and Doe was happy to be away from Ramos. In July 2016, Ramos came to mother and Doe's house late at night. Mother and Ramos went into a bedroom. Upset that Ramos might be trying to get "back together" with mother, Doe banged on the bedroom door, crying. Doe told mother "to stop and to not do it." Confused, mother asked Doe, " 'What's going on?' " Ramos looked "worried," and

² We provide an overview here, and additional factual and procedural details as germane to the discussion of Ramos's claims.

“left fast,” without speaking to Doe. Mother asked Doe what was bothering her, but Doe was afraid to tell mother about the abuse.

The next day, Doe told mother Ramos had raped her. Mother was shocked and upset. That evening, Doe and mother went to the police station and gave statements. Doe also described the molestation in an interview at the Calico Center. In the early morning on July 9, 2016, the police arrested Ramos after a police chase.

Defense Evidence

Ramos testified he entered the United States illegally in 2006 or 2007. He met mother in 2008 and they began dating. While he was dating mother, he had a relationship with a woman in Honduras, whom he impregnated. Ramos married mother even though he did not love her; he stayed in the relationship out of “compassion.” He and mother argued frequently. Doe witnessed the arguments. Ramos often stayed with a friend or slept in the car rather than staying with mother because “it wasn’t easy to be with somebody [he] didn’t love.”

Ramos and mother were destitute. They collected scrap metal to make money. In 2009, Ramos was arrested in Oregon, with \$22,700, hidden in a borrowed car. He was convicted of money laundering and deported to Honduras. Ramos returned to the United States illegally a few months later, even though the woman he loved was in Honduras. In 2010, Ramos was arrested again in Oregon, where he sold heroin. He had cash and thousands of dollars in money transfer receipts. Ramos pled guilty to unspecified felonies and was deported. Eventually, he returned to the United States.

Ramos denied molesting Doe and claimed he was seldom alone with her. He testified Doe lied about the sexual abuse because she did not want him to be in a relationship with mother. Ramos fled from the police in July 2016 to avoid being deported.

DISCUSSION

I.

Any Assumed Error in Giving CALCRIM No. 361 Was Harmless

The court instructed the jury with CALCRIM No. 361 (failure to explain or deny adverse testimony), which provided: “If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure.” Ramos did not object to the instruction.

Ramos claims the court erred by giving CALCRIM No. 361 because he did not fail to explain or deny incriminating evidence. We address the argument on the merits, notwithstanding Ramos’s failure to object to the instruction, applying an independent standard of review. (See *People v. Grandberry* (2019) 35 Cal.App.5th 599, 604.) CALCRIM No. 361 “applies only when a defendant completely fails to explain or deny incriminating evidence, or claims to lack knowledge and it appears from the evidence that the defendant could reasonably be expected to have that knowledge.” (*People v. Cortez* (2016) 63 Cal.4th 101, 117.) “Even if the defendant’s testimony conflicts with other evidence or may be characterized as improbable, incredible, unbelievable, or bizarre, it is not, . . . ‘the functional equivalent of no explanation at all.’ ” (*Id.* at p. 117.) “[T]he focus of CALCRIM No. 361, . . . is not on the defendant’s credibility as a witness, but on the role of a testifying defendant’s failure to explain or deny incriminating evidence in how jurors ‘evaluat[e] that evidence,’ i.e., the evidence the defendant has failed to explain or deny.” (*Id.* at p. 118.)

Here, any assumed error in giving CALCRIM No. 361 was harmless because it is not reasonably probable Ramos would have received a more favorable verdict had the

instruction not been given.³ The evidence supporting Ramos’s guilt was strong, and Ramos’s testimony was implausible. Additionally, the impact of CALCRIM No. 361 was mitigated by the language of the instruction itself, which does not direct the jury to draw adverse inferences against the defendant. Instead, it instructs the failure to explain or deny, by itself, is not a sufficient basis upon which to infer guilt. The instruction also emphasizes the People’s burden to prove guilt beyond a reasonable doubt and leaves the meaning and importance of the defendant’s failure to explain or deny to the jury. (See *People v. Vega* (2015) 236 Cal.App.4th 484, 503.) Other jury instructions mitigated any prejudicial effect of CALCRIM No. 361. For example, the court instructed the jury with CALCRIM No. 200, that “Some of these instructions may not apply, depending on your findings about the facts of the case.” The court also instructed the jury with CALCRIM No. 226, on how to evaluate a witness’s credibility.

In light of the strong evidence of guilt, and the instructions as a whole, it is not reasonably probable Ramos would have obtained a more favorable verdict had CALCRIM No. 361 not been given. (*People v. Vega, supra*, 236 Cal.App.4th at p. 503; *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1472 [“courts have routinely found that the improper giving of CALJIC No. 2.62 [the analog to CALCRIM No. 361] constitutes harmless error”].)

II.

The Prosecutorial Misconduct Claim Fails

Ramos argues the prosecutor committed misconduct in closing argument by (1) misstating facts; (2) disparaging defense counsel; and (3) accusing defense counsel of misstating the burden of proof. Ramos’s claim is forfeited because defense counsel “did not object to the prosecutor’s argument or seek an admonition, and no exception to

³ The error, if any, did not violate Ramos’s federal due process rights. (See *People v. Grandberry, supra*, 35 Cal.App.5th at pp. 610–611 [rejecting argument that CALCRIM No. 361 violated federal due process right to a fair trial]; *People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1066–1067.)

the general rule requiring an objection and request for admonition applies.” (*People v. Dalton* (2019) 7 Cal.5th 166, 253.) The claim also fails on the merits.

A. Any Assumed Misstatement of Fact Was Harmless

During closing argument, the prosecutor urged the jury to reject Ramos’s testimony, telling the jury that Ramos had “spun a story on examination about how the love of his life was in Honduras, and he had a daughter there [H]e has a daughter he’s never met, and he was in Honduras for a matter of four to five months. He came right back, and *he said that he was destitute and he would sleep in his car* even though he had access to thousands of dollars in cash and was arrested multiple times for other offenses.” (Italics added.)

Ramos contends the prosecutor “misstated the facts” because Ramos testified he slept in the car to avoid fights with mother, not because he was destitute. “ ‘[S]tatements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct.’ ” (*People v. Bolton* (1979) 23 Cal.3d 208, 212.) We assume for the sake of argument the prosecutor misstated the reason Ramos slept in the car, but we conclude any error is harmless, whether considered under this state’s “reasonable likelihood of a more favorable verdict” standard or the federal “harmless beyond a reasonable doubt” standard. (*People v. Cook* (2006) 39 Cal.4th 566, 608.)

The prosecutor’s comment was an isolated instance in a closing statement that otherwise focused on admitted evidence, which was quite strong in favor of Ramos’s guilt. Furthermore, the court instructed the jury to determine “what happened based only on the evidence that has been presented to you in this trial” and that “Nothing that the attorneys say is evidence.” For these reasons, we conclude the error was harmless. (See *People v. Collins* (2010) 49 Cal.4th 175, 210–211 [prosecutor’s reference “to facts not in evidence” was harmless].)

B. The Prosecutor Did Not Attack Defense Counsel’s Integrity

In closing argument, defense counsel argued Doe was “lying. . . . I can’t tell you exactly why she’s lying or how that happened. I can’t tell you whether it was her idea or whether an adult . . . put her up to it. . . . We’re just saying it’s wrong. It’s fabricated.

It's lying, and we don't have to prove that. We don't have to show you . . . how it happened, whose idea it was. We don't have to give you any details about that. [¶] The burden of proof is on the Prosecution, and they have to prove their case beyond a reasonable doubt. We're just giving you something to work with." Counsel then outlined a hypothetical scenario about how Doe's lying "may have happened" and urged, "it's reasonably possible that something like that did happen."

In rebuttal argument, the prosecutor responded: "Make no mistake what [defense counsel] did He was calling [Doe] a liar." The prosecutor continued: "And when the Defense says . . . Doe is lying, I don't know the reason why, but she's lying. The Defense is asking you to speculate. He's asking you to make up possible scenarios, possible hypos outside of the box that have nothing to do with the evidence in this case. [¶] The Defense is asking you to disregard the jury instructions and the Court's orders. He's hoping that one of you gets fooled. Don't let them fool you."

“ “A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel.” ’ ’ ” (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1336–1337.) A prosecutor, however, may use colorful language to criticize defense counsel's arguments. Characterizing defense arguments as “ ‘ludicrous,’ ‘ridiculous,’ ‘preposterous,’ ‘outrageous,’ ‘offensive,’ ‘shock[ing]’ or ‘bull’ ” is not misconduct. (*People v. Peoples* (2016) 62 Cal.4th 718, 793.) There was no misconduct here. The prosecutor's comments were not a personal attack on defense counsel, but a permissible criticism of defense counsel's strategy of urging the jury to ignore the evidence. Numerous cases support our conclusion. (See, e.g., *People v. Stitely* (2005) 35 Cal.4th 514, 559 [not misconduct for prosecutor to call defense counsel's arguments ridiculous, outrageous, and a legal smoke screen]; *People v. Marquez* (1992) 1 Cal.4th 553, 575–576 [not misconduct to refer to a “ ‘heavy smokescreen that has been laid down [by the defense] to hide the truth’ ”].)

C. The Prosecutor Did Not Accuse Defense Counsel of Misstating the Burden of Proof

In closing, defense counsel reminded the jury that the prosecution had the burden of proof beyond a reasonable doubt, and suggested the jury, after considering the evidence, could “arrive at several conclusions, all ranging from [Ramos] is innocent [I]t’s reasonably possible that he’s innocent. That he didn’t do any of this, any of the things that [Doe] says he did. And if it’s just reasonably possible that it happened the way [Ramos] says it happened and that nothing happened, then you’re required to come back with a verdict of not guilty.” In rebuttal, the prosecutor said the defense “misstated the standard in this case. It’s reasonable doubt as to the charge. It is not as to every single piece of evidence.”

Ramos claims the prosecutor “wrongly accused defense counsel of misstating the standard of proof.” We disagree. When considered in the context of the prosecutor’s rebuttal argument as a whole, it is clear the prosecutor was not accusing defense counsel of misstating the burden of proof, but rather reminding the jury to focus on the relevant evidence, and to disregard Ramos’s version of the events. “ ‘An argument [that] does no more than point out that the defense is attempting to confuse the issues and urges the jury to focus on what the prosecution believes is the relevant evidence is not improper.’ ” (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502.)

The prosecutor’s comments, either considered singly or together, did not infect the “trial with unfairness [so as to] create a denial of due process” nor involve “the use of deceptive or reprehensible methods to persuade the court or jury.” (*People v. Watkins* (2012) 55 Cal.4th 999, 1031–1032.) Ramos’s prosecutorial misconduct claim fails.

DISPOSITION

The judgment is affirmed.

Jones, P.J.

WE CONCUR:

Simons, J.

Needham, J.

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